

87-2076

No.

Supreme Court, U.S.

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JOSEPH T. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

J & C, INC. and T-K CO.,
A Joint Venture - - - - - Petitioner

versus

COMBINED COMMUNICATIONS CORPORA-
TION OF KENTUCKY, INC., and
MARK KOEBRICH - - - - - Respondents

On Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Fact That a Public Figure Defamation Plaintiff Is Not Named In a Broadcast In and Of Itself Negate Any Possibility That the Broadcast Was Made With Constitutional "Actual Malice?" Or May a Plaintiff In Such a Situation Resort to Common-Law Rules of Colloquium In Order to Prevail, So Long As He Otherwise Proves the Requisite "Actual Malice?"

PARTIES TO THIS PROCEEDING

The Petitioner is J & C, Inc. and T-K Co., a joint venture.

The Respondents are Combined Communications Corporation of Kentucky, Inc., and Mark Koebrich.

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No. _____

J & C, INC. AND T-K Co.,
a Joint Venture - - - - *Petitioner*

v.

COMBINED COMMUNICATIONS CORPORA-
TION OF KENTUCKY, INC. and
MARK KOEBRICH - - - - - *Respondents*

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF KENTUCKY

PETITION FOR A WRIT OF CERTIORARI

REPORTS OF OPINIONS BELOW

The Opinion of the Court of Appeals of Kentucky was ordered “depublished” by the Kentucky Supreme Court, and therefore does not appear in any official or unofficial reports known to the Petitioner.

**GROUND S UPON WHICH THE JURISDICTION
OF THIS COURT IS INVOKED**

The date of the Order sought to be reviewed is March 22, 1988. It does not show a different date of entry. Under Kentucky Rules of Court, no petition or application for rehearing of this Order was possible.

The Petitioner believes that this Court has jurisdiction to review the Order and its antecedent opinions by writ of certiorari under and by virtue of the provisions of 28 United States Code Section 1257 (3).

**CONSTITUTIONAL PROVISION INVOLVED
IN THIS CASE**

United States Constitution
Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

When viewed in its entirety, this is an extremely complex case. However, the issue upon which the Petitioner relies in this pleading is relatively simple, so that the background information necessary to present it should consume little space.

During the late 1970's the Thompson-Kissel Company, a Louisville commercial refrigeration company, and J & C Inc., a corporation composed solely of its owner, Glen Crum formed a joint venture, J & C Inc., and T-K Co., for the purpose of selling a substance composed of recycled sewage sludge and wood chips to the owners of strip-mined lands in Kentucky and Southern Indiana. The Plaintiffs below included Thompson-

Kissel Company, its sole owner H. W. Thompson, and the Joint Venture. Glen Crum was not a litigant below.

Just when the Joint Venture was ready to deliver its product, named Lou-Organite, to landowners, the Defendants below, Combined Communications Corporation of Kentucky, Inc., which owned television station Channel 32 in Louisville, Kentucky, at the time, and its Indiana "investigative reporter," Mark Koebrich, began a series of 19 viciously defamatory broadcasts about the Joint Venture and its principals that lasted from August 6, 1980 until January 18, 1981.

During the course of this series of broadcasts, the Defendants frequently referred to the Joint Venture's product, which had been certified as environmentally safe by every agency concerned with such matters, as "crap," just plain "sewage," and most favorably as "sludge from the sewers of Louisville." They also juxtaposed their inflammatory broadcasts about the Joint Venture and its principals with stories about a notorious local chemical polluter, Donald Distler, who had been convicted of dumping thousands of gallons of the most noxious and dangerous chemicals into Louisville's sewers, and other environmental disasters. Finally, in two separate broadcasts, one of which is the subject of this Petition, the Defendants stated that the Plaintiff H. W. Thompson and the Plaintiff Joint Venture, respectively, were the subjects of "civil and criminal charges," which was no truer than most of the other material in the sensationalist series of broadcasts.

After a two week trial, a jury of the Jefferson Circuit Court awarded the Plaintiff Thompson \$120,000 in damages, the Plaintiff Thompson-Kissel Company \$56,000, and the Joint Venture \$2,689,000. All but \$1,000 of the latter award was for business lost due to the broadcasts. The jury's awards were based upon false light invasion of privacy stemming from all 19 broadcasts as to each of the Plaintiffs. In addition, as to the Plaintiffs H. W. Thompson and the Joint Venture, the jury made a finding that they were libeled as a result of the false accusations of civil and criminal charges pending against them. The jury found for the Defendants upon the claim of the Plaintiff Thompson-Kissel Company for libel.

By post-trial order, the Jefferson Circuit Court set aside the damage award to the Joint Venture upon the purported ground that the Plaintiff failed to prove lost profits with the specificity required by Kentucky law. The court refused to set aside any of the other of the jury's awards.

Both parties appealed the Court's final judgment to the Kentucky Court of Appeals. In its final opinion, the Court vacated the award to the Thompson-Kissel Company upon the ground that only live persons can recover under a false light theory in Kentucky and that the jury had found against this Plaintiff on its libel claim, leaving nothing left to try as to it. The Court of Appeals reversed the jury's award to the Plaintiff Thompson and ordered a new trial upon all of his claims upon the ground that the trial

judge did not give a Constitutional "actual malice" instruction to the jury on Thompson's libel claim (the trial court had determined that Thompson was not a limited purpose "public figure," the Court of Appeals disagreed). Finally, the Court of Appeals affirmed the trial Court's vacating of the jury's award to the Joint Venture. However, its grounds for doing so were not those of the trial court. Instead, the appellate Court stated that (a) the Joint Venture could not maintain a "false light" claim; and (b) that the Joint Venture had not shown with "convincing clarity" that the Defendants illustrated Constitutional actual malice in publishing the broadcast that had formed the basis of the Joint Venture's libel claim.

The Petitioner seeks review only of this latter portion of the opinion of the Court of Appeals of Kentucky, which was left undisturbed by the Supreme Court of Kentucky's denial of the motion of the Plaintiffs below for discretionary review, which denial took place on March 22, 1988.

The Circuit Court submitted the Joint Venture's libel count to the jury at the trial of this case based upon the content of the Defendant's news broadcasts of December 18, 1980. The first such broadcast, which aired at 5:30 p.m. Eastern Standard time, read as follows:

TELEPROMPTER: More than 20,000 tons of sewage sludge from Louisville, illegally stored on property in Clark County, may soon be the target of more court action.

Our Indiana Bureau Chief, Mark Koebrich, reports that if efforts to remove the sludge aren't under way soon, the Clark County Prosecutor's office will initiate a series of \$300-a-day-fines.

MR. KOEBRICH (Video): The first truckloads of sludge arrived in Clarksville in mid-August unannounced and unwanted.

FEMALE INTERVIEWEE: I'm against it, and it appears that everyone else down here that has property is completely against both the dumping, the odor, the possible contamination of our well water, because we do not have city water.

MR. KOEBRICH (Video): In a similar move not more than a month later, the firm started trucking the stuff to a site east of Charlestown with the same results.

MALE INTERVIEWEE: I don't like to see my community made a place to pile crap.

MR. KOEBRICH (Video): Angry Indiana officials ordered the firm to stop hauling and clear both sites, a directive they've ignored. So now, the Clark County Prosecutor's office is getting tough. Civil and criminal actions have been filed citing violations of zoning regulations at the Charlestown site, the land clearly designated for agricultural use only, not industrial or commercial use.

Clark County Prosecutor, Dan Donahue, says he'll press harder if necessary.

MR. DONAHUE: If immediate action isn't undertaken by the first of the year then we will begin to take immediate action on a daily basis.

MR. KOEBRICH (Video): A daily basis means a \$300-a-day fine for every day the sludge remains

where it is. Attempts to reach the Louisville firms involved in the sludge operation were unsuccessful.

Mark Koebrich, 32 Alive News, Indiana.

The next broadcast aired on the evening of December 18, 1980, at 11:00 p.m., Eastern Standard Time. It read as follows:

TELEPROMPTER: More than 20,000 tons of sewage sludge from Louisville, illegally stored on property in Clark County, may soon be the target of more court action. The Louisville firm that trucked the material to sites in Clarksville and Charlestown late last summer, has so far ignored directives to remove it.

Some civil and criminal action has already been taken, but Clark County Prosecutor, Dan Donahue says he'll press harder, if necessary.

MR. DONAHUE: If immediate action isn't undertaken by the first of the year, then we will begin to take immediate action on a daily basis.

MR. KOEBRICH (Video): Okay. So that we're talking about a fine—

MR. DONAHUE: (Interrupting) We're talking about a maximum \$300 fine under the ordinance.

TELEPROMPTER: That's \$300 a day in penalties. No comment today from the sludge firms in Louisville involved in the operation.

The transcripts of these broadcasts was located in the Appendix for the Court of Appeals of Kentucky, pp. 162-164.

The Plaintiffs proved at the trial of this case that the Defendant Koebrich knew at the time of these broadcasts that no civil or criminal charges had ever

been filed by any agency or authority against any of the Plaintiffs, including the two "firms" (the Joint Venture and the Thompson-Kissel Company) among them (Transcript of Evidence, 8th day, Vol. I, p. 57). The Clark County Prosecutor told Koebrich only that such charges were possible against the Plaintiffs if he determined that Lou-Organite or the recycled material from which it was made contained a legal contaminant. As the Defendants well knew, such a determination was never made (Donahue Depo., p. 29). At no time before or after the broadcast recited above were any civil or criminal charges filed against any of the Plaintiffs relating to their activities in and around Clarksville or Charlestown, Indiana.

In a Petition for Rehearing filed with the Court of Appeals, the Defendants pointed to the fact that civil and criminal charges had indeed been filed against the landowner of the site in Charlestown, Indiana, used by the Joint Venture. This gentleman's name was Oscar Combs.

With this fact as its sole basis, the Defendants in their Petition for Rehearing argued for the first time before any Court that their accusation concerning civil and criminal charges in the December 18, 1980, broadcasts was "true" as a matter of law, thereby negating any possibility that the broadcasts were motivated by Constitutional "actual malice," (Petition for Rehearing for Kentucky Court of Appeals, Pages 1-3).

The Plaintiffs, of course, responded that the broadcasts nowhere mentioned Oscar Combs, or made any

attempt to indicate that it was a "landowner" or any other person or entity distinct from "the firm" mentioned in the broadcasts who was the recipient of the civil and criminal charges set forth in them. In summary, said the Plaintiffs, these broadcasts gave, ". . . the listener or viewer the *inescapable impression* that the *charges were brought against the Joint Venture.*" (Response to petition for Rehearing before the Kentucky Court of Appeals, pp. 1-3).

Incredibly, the Court of Appeals of Kentucky brought Defendants' cockamamie argument (Final Opinion, Court of Appeals, pp. 10-12). At p. 11 of its opinion, it opined as follows:

As to the December 18, 1980, broadcast, we agree that the evidence can not meet the required standard of review [that of Constitutional "actual malice"]. There had in fact been civil and criminal actions filed against the property owner at the Charleston [sic] site. Consequently, it cannot be said that the broadcast was made with the knowledge that the information was false or with reckless disregard of its truth or falsity. Although it may be argued that the broadcast could be interpreted to infer that the charges were against "the firm" (Joint Venture) since we have herein held that a business entity has no right of action for being placed in a "false light," the evidence fails to show actual malice with convincing clarity and the libel claim of the joint venture should be dismissed.

The Court's purported authorities for this holding, which holding the Petitioners are now attacking, were

the cases of *New York Times v. Sullivan*, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), *St. Amant v. Thompson*, 390 U. S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968) and *Bose v. Consumers' Union of the United States, Inc.*, 466 U. S. 485, 514, 104 S. Ct. 249, 80 L. Ed. 2d 502 (1984), (Final Opinion of the Court of Appeals of Kentucky, pp. 10-12).

ARGUMENT

The Mere Fact That a Defamation Plaintiff Must Resort To Common Law Colloquium Does Not In and Of Itself Negate Any Possibility That He Can Prevail Against a Media Defendant.

The Opinion of the Court of Appeals of Kentucky in this case essentially stands for the proposition that a defamation plaintiff may never recover from a media defendant entitled to avail itself of the Constitutional privilege to attack "public figures" when he has to resort to common law rules of colloquium to prevail.

This proposition is absurd on its face. If permitted to stand, it will permit the Defendants in this case to get away with the most vicious libel by hiding behind one of the oldest tricks in the mudslinger's book: not directly naming the person to whom a calumny is directed.

Even in the rarefied world of the cases interpreting the rights of a free press, this Court has basically deferred to the common law of defamation whenever appropriate, see *Gertz v. Robert Welch*, 418 U. S. 323, 94 S. Ct. 2997, 3010-3102, 41 L. Ed. 2d 789 (1974). So far as the Petitioner has been able to determine, no

federal court, and certainly not this Court, has ever held that the widely applied common-law rules of colloquium were somehow superseded by the Constitutional privilege to attack public figures so long as no "actual malice" was proven.

These rules, of course, prevent the very tactic approved by the Kentucky Court of Appeals in the case at bar. As stated by the Kentucky Court of Appeals, then the state's highest Court, in the case of *Axton-Fisher Tobacco Co. v. Evening Post Co.*, 169 Ky. 183 S. W. 269, 274 (1916), the rules are that:

. . . when a publication, reading the whole of it, is plainly directed at a person or corporation . . . the person or corporation intended to be and that is in fact assailed by the publication may maintain an action for libel as freely as if he or it were particularly named or described in the publication.

No intelligent auditor of the December 18, 1980 broadcast by Channel 32 could come to any reasonable conclusion other than that: (a) the "firm" mentioned in the story was the Joint Venture; and (b) that the "firm" was the object of the "Civil and criminal actions [that] have been filed citing violations of zoning regulations at the Charlestown site," or of the, "Some civil and criminal action [that] has already been taken," to quote the language of the early and late broadcasts, respectively of that day (Appendix for Ky. Court of Appeals, pp. 162-164).

The media constantly seek to covert their already very liberal privilege to attack "public figures" in the most robust manner into what is essentially an absolute

privilege to defame and traduce the reputations of such figures. The opinion of the Court of Appeals in this case ends the war in this arena in favor of the media. Any publication or broadcaster worth its salt can figure out a way to defame a person or corporation without directly mentioning the object of its attacks.

Of course, it may be argued that the Supreme Court of Kentucky put this spectre to rest by ordering the Opinion of the Court of Appeals to be "de-published," so that it will have no precedential value. This fact, of course, is of little solace to the Petitioner in this case. Furthermore, this Court may be assured that the argument at issue in this case will appear another day, and probably very soon, given the media's intense pre-occupation with "protecting" (i.e. expanding) its privileges in the First Amendment area. Finally, of course, Rule 17 of this Court gives no preference to published as opposed to unpublished opinions, and Petitioner believes that it is quite clear that the Kentucky Court of Appeals, ". . . has decided an important question of federal law which has not been, but

should be, settled by this Court," Rule 17.1(c) of the Supreme Court.

Respectfully submitted,

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CERTIFICATE

We hereby certify that we have mailed true copies of this Petition to Wesley P. Adams, 2800 First National Tower, Louisville, Kentucky 40202 and John B. McCrory and William S. Brandt, Lincoln First Tower, Rochester, New York 14604, attorneys for the Respondents, upon this 17th day of June, 1988, as per Rule 28.3 of the Supreme Court of the United States.

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APPENDIX



No. 81CI-03556

JEFFERSON CIRCUIT COURT

TWELFTH DIVISION

H. W. THOMPSON, et al. - - - - - *Plaintiffs*
v.
COMBINED COMMUNICATIONS OF KENTUCKY,
Inc., et al. - - - - - *Defendants*

JUDGMENT—Entered November 18, 1985

This case having come on for trial on October 16, 1985, and the Plaintiffs appearing, in person, and by representative, and by counsel, and the Defendants appearing, in person and by counsel, and the Court having seated the jury, and the evidence having been presented by testimony and exhibits, and the jury having been instructed at the conclusion of the evidence, and the jury having returned the following verdict based upon the instructions and the interrogatories submitted to them:

In publishing their television programs of January 8, 1981, relating to the plaintiff, *Thompson*, where Channel 32 reported that Thompson was "facing civil and criminal counts, do you believe from a preponderance of the evidence that that statement was false and tended to bring Thompson into public hatred, contempt or ridicule; or that they caused Thompson to be shunned or avoided or injured him in his business or occupation?

9 YES3 NO

In publishing their television program of January 8, 1981, relating to the plaintiff, *Thompson*, wherein

Channel 32 reported that Thompson was "facing civil and criminal counts, do you believe from a preponderance of the evidence that the defendants failed to exercise reasonable care and caution in checking on the truth or falsity of the defamatory character of the communication before publishing it?

11 YES

1 NO

In publishing their television program of December 18, 1980, relating to the *Thompson Kissel*, where Channel 32 published that "civil and criminal actions have been filed", do you believe from a preponderance of the evidence that this statement was false and tended to bring the Thompson-Kissel into public hatred, contempt or ridicule; or that they caused the Thompson-Kissel to be shunned or avoided or injured the business of Thompson-Kissel?

3 YES

9 NO

In publishing their television program of December 18, 1980, relating to the *Thompson-Kissel*, where Channel 32 published that "civil and criminal actions have been filed", do you believe from a preponderance of the evidence that Channel 32 failed to exercise reasonable care and caution in checking on the truth and falsity and the defamatory character, if any, of the communication before publishing it?

9 YES

3 NO

In their television programs of December 18, 1980, relating to the *Joint Venture*, where Channel 32 published that "civil and criminal actions have been filed", do you believe from a preponderance of the evidence that this statement was false and tended to bring the Joint Venture into public hatred, contempt or ridicule;

or that it caused the Joint Venture to be shunned or avoided; or injured the business of the Joint Venture?

9 YES

3 NO

In publishing their television programs of December 18, 1980, relating to the *Joint Venture*, where Channel 32 published that "civil and criminal actions have been filed", do you believe from a preponderance of the evidence that Channel 32 failed to exercise reasonable care and caution in checking on the truth and falsity and the defamatory character, if any, of the communication before publishing it.

9 YES

3 NO

Do you believe from a preponderance of the evidence that the defendants during any one or more of the publications of which you have heard evidence made false statements about Thompson placing him in a false light which would be highly offensive to a reasonable person and that Channel 32 had knowledge of or acted in reckless disregard as to the falsity of the publicized material and the false light in which Thompson was placed.

10 YES

2 NO

Do you believe from a preponderance of the evidence that the defendants during any one or more of the publications of which you have heard evidence made false statements about Thompson-Kissel placing it in a false light which would be highly offensive to a reasonable person and that Channel 32 had knowledge of or acted in reckless disregard as to the falsity of the publicized material and the false light in which Thompson-Kissel was placed.

9 YES

3 NO

Do you believe from a preponderance of the evidence that the defendants during any one or more of the

publications of which you have heard evidence made false statements about Joint Venture placing it in a false light which would be highly offensive to a reasonable person and that Channel 32 had knowledge of or acted in reckless disregard as to the falsity of the publicized material and the false light in which Joint Venture was placed.

9 YES

3 NO

We, the jury, find for *H. W. Thompson* on his claim against the defendants, Mark Koebrich and Channel 32, and award him the following compensatory damages:

- | | |
|---|-------------|
| (a) for public disgrace, scorn
and ridicule; | \$10,000.00 |
| (b) injury to his business directly
resulting therefrom; | \$50,000.00 |
| (c) injury to his reputation and standing
in the general public. | \$50,000.00 |

We, the jury, find for the plaintiff, Thompson, on his claim against the defendants for punitive damages and award him the sum of \$10,000.00.

We, the jury, find for *Thompson-Kissel* on its claim against the defendants, Mark Koebrich and Channel 32, and award him the following compensatory damages:

- | | |
|---|-------------|
| (a) for public disgrace, scorn
and ridicule; | \$10,000.00 |
| (b) injury to his business directly
resulting therefrom; | \$20,000.00 |
| (c) injury to his reputation and standing
in the general public. | \$25,000.00 |

We, the jury, find for the plaintiff, Thompson-Kissel, on his claim against the defendants for punitive damages and award him the sum of \$1,000.00.

We, the jury, find for *Joint Venture* on its claim against the defendants, Mark Koebrich and Channel 32, and award him the following compensatory damages:

- | | |
|---|----------------|
| (a) for public disgrace, scorn
and ridicule; | \$ 0 |
| (b) injury to his business di-
rectly resulting therefrom; | \$2,688,000.00 |
| (c) injury to his reputation and stand-
ing in the general public. | \$ 0 |

We, the jury, find for the plaintiff, Joint Venture, on his claim against the defendants for punitive damages and award him the sum of \$1,000.00.

The Court having considered the verdict and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The Plaintiff, H. W. Thompson, shall recover from the Defendant, Mark Koebrich, and the Defendant, Combined Communications of Kentucky, Inc., jointly and severally, the sum of \$110,000.00 in compensatory damages and \$10,000.00 in punitive damages, plus interest from the date of judgment and his Court costs herein expended, for all of which execution may issue.

2. The Plaintiff, Thompson-Kissel Company, shall recover from the Defendants, Mark Koebrich and Combined Communications of Kentucky, Inc., jointly and severally, the sum of \$55,000.00 in compensatory damages and \$1,000.00 in punitive damages, plus interest from the date of judgment and its Court costs herein expended, for all of which execution may issue.

3. The Plaintiff, T-K Co. and J & C, Inc., a Joint Venture, shall recover from the Defendants, Mark Koebrich and Combined Communications of Kentucky, Inc.,

jointly and severally, the sum of \$2,688,000.00 in compensatory damages and \$1,000.00 in punitive damages, plus interest from the date of judgment and its Court costs herein expended, for all of which execution may issue.

There being no just cause for delay, this is a final and appealable judgment.

(s) Edwin Schroering, Jr.
Judge
Jefferson Circuit Court
Division Twelve

CERTIFICATE

I hereby certify that a true copy of the foregoing was mailed, postage pre-paid, to Mr. Wesley P. Adams, Jr., Goldberg and Simpson, 2800 First National Tower, Louisville, Kentucky 40202, this 5th day of November, 1985.

(s) William W. Lawrence
William W. Lawrence

No. 81CI 03556

JEFFERSON CIRCUIT COURT**TWELFTH DIVISION**

H. W. THOMPSON, Et Al. - - - - *Plaintiff*
v.
COMBINED COMMUNICATIONS OF KENTUCKY,
INC., Et Al. - - - - - *Defendant*

OPINION AND ORDER—Entered April 21, 1986

On November 5, 1985, after a nineteen (19) day "libel and false light" trial in the Jefferson Circuit Court, the jury returned verdicts in favor of plaintiffs, H. W. Thompson (Thompson), Thompson Kissel Company (Thompson-Kissel), and Joint Venture (Joint Venture), against Mark Koebrich and Combined Communications of Kentucky, Inc. for varying amounts, to-wit:

1. For Thompson, \$110,000.00 compensatory damage and \$10,000.00 punitive damages.
2. For Thompson-Kissel, \$55,000.00 compensatory damages and \$1,000.00 punitive damages.
3. For Joint Venture, \$2,688,000.00 compensatory damages plus \$1,000.00 punitive damages.

Within the prescribed time, defendants moved this Court for a Judgment Notwithstanding The Verdict and for a new trial. Defendants main thrust is directed against the Jury's verdict of \$2,688,000.00 in favor of an entity called the "Joint Venture".

The proof, during the trial, showed that the "Joint Venture" is an entity which was organized by Mr. Thomp-

son and his partner Crum for the purpose of obtaining, storing, mixing and selling the material which was obtained under a contract from the Metropolitan Sewer District.

Plaintiffs contended that treated material was marketable as a soil supplement called "Lou-Organite" and that they suffered business losses because of the actions of the defendant in publicizing television news stories downgrading their product. The defendants contend that there is insufficient evidence to show a business loss and that plaintiffs did not establish that the product itself was marketable or saleable.

It was the plaintiffs' burden to prove with reasonable certainty that there were lost profits. Since this was a new business, i.e., there were no other businesses like it and the company itself had no track record, it is the rule in Kentucky that lost profits are required to be established with reasonable certainty.

The Kentucky Supreme Court has adopted the position espoused by the Restatement of Contracts (second), comment b:

However, if the business is a new one . . . proof will be more difficult. Nevertheless, damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys, and analysis, business records and similar enterprises, and the like. *Pauline's Chicken Villa, Inc., v. K.F.C. Corporation*, Ky., 701 S. W. 2d 399 (1985).

The Supreme Court recognized that there is no single definition of "reasonable certainty" to be used as a yardstick. Thus, it is the plaintiff's burden to introduce evidence which will "virtually eliminate all the uncertain variables". *Pauline's Chicken Villa, Inc. v. K.F.C. Corporation*, *supra*. The evidence must be such that the Jury does not have to speculate or arrive at their decision by con-

jecture, speculation or surmise. *Western Union Telegraph Company v. Ramsey*, Ky., 88 S. W. 2d 675 (1935).

The defendants properly preserved their objections on this account in their Motions for a Directed Verdict at the end of the plaintiff's proof and also at the end of the trial. Thus, the Court must now consider whether or not the evidence is sufficient to support the verdict of the Jury in the light of the law.

Mr. Thompson's partner, Mr. Crum, testified that the "Joint Venture" product "Lou-Organite" was "set" at \$40.00 per ton. Unfortunately, Mr. Crum's testimony as to the market price was wholly uncorroborated since there was never any testimony presented that "Lou-Organite" had ever sold for this market price. Only one person testified as to the purchase of "Lou-Organite". Mr. Frank Otte, a nurseryman, bought it in an effort to see if it was useful as a potting supplement. He potted some of it and planted certain of his plants in it. After a length of time, he concluded that it was not suitable for that purpose.

Although Mr. Otte was the only person that purchased any of the "Lou-Organite", he paid ninety-five cents per ton, far below the \$40.25 per ton price which Mr. Crum had established.

The only other testimony as to the market price of the "Lou-Organite" was that of the company's CPA, Mr. Joseph Lusk. Mr. Lusk did not testify as to the demand for this product or its marketability. He testified as to what the company's profits were if it had been able to sell the product available in accordance with the contracts that the company had with the M.S.D. These computations were based on the premise that all of the "Lou-Organite" produced could be sold at a net profit of \$8.00 per ton. Although the parties stipulated that there was a market for a fill to cover strip mine areas in Eastern Kentucky, it

was never properly connected by the proof to the "Lou-Organite".

The plaintiffs made a valiant effort to establish that the "Lou-Organite" was marketable, and was effective as a soil medium. During the testimony of Mr. Crum, he spoke of a study made by the University of Kentucky involving the use of sludge from Louisville, Eastern Kentucky and West Virginia. When Mr. Crum attempted to introduce the results of the study, the defendants objected to the results of the study being recounted without a foundation being laid. The objection was conditionally overruled. The plaintiffs failed to produce the person who made the study or any other competent witness who could lay the foundation. The defendants restated their objection after the close of all evidence. This evidence was, thus, not admissible and should not have been considered by the Jury.

The Court believes that the plaintiffs did not establish, with reasonable certainty, their burden as required by the above cited cases. Thus, that portion of the verdict of the Jury in favor of the "Joint Venture" which awards \$2,688,000.00 compensatory damages and \$1,000.00 punitive damages should be set aside. However, the findings of the Jury as to the other plaintiffs, Thompson and the Thompson Kissel Company, are supported by sufficient proof and the plaintiff's Motion with respect to those findings should be overruled.

ORDER

Motion having been made and the Court having considered the defendants' Motion for a Judgment Notwithstanding the Verdict on the Judgment of this Court dated the 18th day of November, 1985, be and the same is hereby sustained only as to that portion of the Judgment which

applies to the award of compensatory and punitive damages to the "Joint Venture" in the respective sums of \$2,688,000.00 compensatory damages and \$1,000.00 punitive damages. The defendants' Motion for a new trial is overruled. This is a Final Order.

(s) Edwin Schroering, Jr.

Edwin A. Schroering, Jr., Judge

Date April 21, 1986

Copy To:

William W. Lawrence/H. Joseph Marshall

Rebecca Westerfield/Wesley P. Adams

COURT OF APPEALS OF KENTUCKY

No. 86-CA-1243-MR

J. & C. Inc., and T-K Co.,
a joint venture - - - - - *Appellant*

v.

COMBINED COMMUNICATIONS CORPORATION
OF KENTUCKY, Inc.; and
MARK KOEBRICH - - - - - *Appellees*

*Appeal from Jefferson Circuit Court
Honorable Edwin A. Schroering, Judge
Action No. 81-CI-03556*

AND

No. 86-CA-1298-MR

COMBINED COMMUNICATIONS CORPORATION
OF KENTUCKY, Inc.; and
MARK KOEBRICH - - - - - *Appellants*

v.

H. W. THOMPSON, Individually and
THOMPSON-KISSEL COMPANY - - - - - *Appellees*

*Appeal from Jefferson Circuit Court
Honorable Edwin A. Schroering, Judge
Action No. 81-CI-03556*

**ORDER GRANTING PETITION FOR REHEARING
AND MODIFYING THE OPINION ON ITS FACE**

BEFORE: GUDGEL, LESTER, and WEST, Judges.

GUDGEL, JUDGE: The Court having considered the Petition for Rehearing and the Response thereto, and having been sufficiently advised, it is ORDERED that the Petition is hereby GRANTED to the extent that the opinion rendered August 14, 1987, is MODIFIED on its face by the substitution of the attached pages 1, 9, 10, 11, 12, and 13 for the corresponding pages in the opinion as originally rendered.

ENTERED: December 11, 1987

(s) Paul D. Gudgel
Judge, Court of Appeals

OPINION RENDERED: AUGUST 14, 1987; 3:00 P.M.
TO BE PUBLISHED
AS MODIFIED: DECEMBER 11, 1987; 10:00 A.M.

COURT OF APPEALS OF KENTUCKY

No. 86-CA-1243-MR

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*Appeal from Jefferson Circuit Court
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Action No. 81-CI-03556*

REVERSING AND REMANDING

BEFORE: LESTER, GUDGEL and WEST, Judges.

WEST, JUDGE. This is an appeal and cross-appeal arising out of an action for libel and invasion of privacy. The plaintiffs below were H. W. Thompson, the Thompson-Kissel Company, and a business we will refer to simply as the joint venture. The defendants were Combined Communications Corporation, owner of WLKY (Channel 32) television station and Mark Koebrich, a reporter for Channel 32.

In June, 1979, Mr. Thompson, owner of a commercial refrigeration company (Thompson-Kissel), joined forces with a Glen Crum and his partner (J. & C. Co. Inc.) to form the joint venture. Mr. Crum had developed an idea that "sludge" or dry cake material produced by sewage treatment plants could be mixed with other ingredients and used to reclaim or revegetate strip-mined lands. The joint venture entered into a contract with the Louisville Metropolitan Sewer District (MSD) to remove a stockpile consisting of 181,501 tons whereby it would receive \$13.00 per ton from MSD. The plan was to haul off the sludge, mix it with other ingredients, such as wood chips, and sell the resulting product to coal companies for use in reclaiming strip mined lands. The plaintiffs apparently encountered problems and protests when they began searching for a site for storage and mixing of the product. Some articles appeared in Louisville newspapers indicating that the trio could find no location in Kentucky and that a site had been selected near Clarksville, Indiana. An article in the Louisville Times on August 5, 1980, reported that residents living near the temporary storage site had "complained about the odor from the sludge and about droppings from trucks" and that numerous Kentucky counties had denied lands for storage to the appellees.

The following day, Channel 32 began telecasting a series of news stories regarding the joint venture's project. These stories included reports of protests of local residents, news of a Clarksville Town Board meeting and an expected unfavorable vote, plans for a new proposed storage site and efforts in that direction, and finally a report that Thompson was "facing civil and criminal counts." These broadcasts spanned a period from August 1980 to January 1981, a time when newspaper articles were also frequently appearing in the Louisville Times and Courier-Journal regarding this project.

On April 15, 1981, the plaintiffs filed their complaint against the defendant television station and its reporter, alleging libel and an invasion of privacy ("false light") as the causes of action. The case proceeded to trial before a jury which returned verdicts for all three plaintiffs. We assume from the interrogatories to the jury that their verdict was on both causes of action for Mr. Thompson and the joint venture, but only for Thompson-Kissel Company as to the invasion of privacy claim. Awards to the three defendants, without distinguishing between damages for false light and damages for libel, totalled \$2,865,000.

Upon a motion for judgment notwithstanding the verdict, the court set aside the award to the joint venture. Defendants below appeal from the judgment awarding damages to Thompson-Kissel and Mr. Thompson. Plaintiffs cross-appeal from the order setting aside the award to the joint venture.

I. The "False Light" Action

The complaint alleged that defendants had placed Thompson-Kissel Company (Mr. Thompson's refrigeration business) in a "false light" thereby invading its right

of privacy.¹ The jury found for the joint venture and Thompson-Kissel on this claim. In its motion for judgment NOV and on appeal, defendants have argued that there is no cause of action for invasion of the right of privacy on behalf of a corporation or business entity. We agree.

We believe the law is well settled that the right of privacy tort developed to "protect the feelings and sensibilities of human beings, rather than to safeguard property, business, or other pecuniary interests." *Maysville Transit Co. v. Ort*, 296 Ky. 524, 177 S. W. 2d 369, 370 (1944). Absent a specific statutory right of privacy, corporations and business entities have no cause of action for the "false light" tort. *Tomlin v. Taylor*, 290 Ky. 619, 162 S. W. 2d 210, 213 (1942).

Accordingly, the judgments on that cause of action in favor of the two businesses must be reversed. Appellees apparently concede the error, but claim it cannot be considered on appeal due to defendant's failure to raise it prior to trial. It appears that this defense was not asserted until after trial in appellant's motions for JNOV and for a new trial. We are hesitant to allow parties to raise claims or defenses on appeal that were not raised below. *Lawrence v. Risen*, Ky. App., 598 S. W. 2d 474 (1980). However, we have concluded that this cause must be reversed and remanded for retrial on other grounds which we will discuss in this opinion. As such, we cannot allow the case to be retried under a theory of liability which has specifically been rejected as a matter of law in this Commonwealth.

¹This same allegation was made regarding the joint venture, however, as mentioned previously, the court below set aside the jury award to it on grounds that its damages were too speculative to sustain the verdict.

In *Vinson v. Gobrecht*, Ky. App., 560 S. W. 2d 242 (1977), the trial court instructed the jury under principles of comparative negligence. Of course, that was several years prior to *Hilen v. Hays*, Ky., 673 S. W. 2d 713 (1984), and the adoption of comparative negligence in Kentucky. Even though the jury verdict in *Vinson* indicated a finding of contributory negligence which should bar the claim, this Court reversed for a new trial, holding that it would amount to a manifest injustice to direct the trial court to enter a judgment which resulted from erroneous instructions. *Vinson, supra*, at 243. CR 61.02. While the *Vinson* Court found that the issue had been preserved by specific objections during trial and in the case at bar the issue was not raised until the motion for JNOV, nonetheless, we believe that to allow recovery by a corporation or business entity for an action that is "personal" to individuals would be contrary to the law of the Commonwealth and thus constitute manifest injustice. CR 61.02.

Assuming the evidence is the same on retrial, only Mr. Thompson individually would be entitled to an instruction on the "false light" invasion of privacy.

II. THE LIBEL ACTION—"PUBLIC FIGURE vs. PRIVATE INDIVIDUAL"

Appellant's second claim on appeal is that the court below improperly applied a negligence standard rather than an actual malice standard to prove liability for actual damages. According to appellants, Mr. Thompson was a limited purpose public figure and as such, was required to prove that the alleged defamation was published with "actual malice." *New York Times v. Sullivan*, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

In *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) the Court discussed the public

figure category more fully, noting that some individuals "occupy position of such pervasive power and influence that they are deemed public figures for all purposes." *Id.* at 345, 94 S. Ct. at 3009. However, it is more common to find individuals who become involved in a public controversy and thus are public figures only in regard to that particular controversy. *Id.* more recently, courts have begun applying a two-part inquiry for determining whether a plaintiff is a limited purpose public figure. *Marcone v. Penthouse Intern'l Magazine for Men*, 754 F. 2d 1072 (3rd Cir. 1985). It is well settled that the classification of a plaintiff as a public or private figure is a question of law to be determined initially by the trial court and scrutinized carefully by an appellate court. *Wolston v. Reader's Digest Ass'n., Inc.*, 443 U. S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979).

The court must consider first, whether the alleged defamation involves a public controversy, and second, the nature and extent of plaintiff's involvement in that controversy. *Marcone, supra*, 754 F. 2d 1082. In *Time, Inc. v. Firestone*, 424 U. S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976), the Court rejected equating "public controversy" with all disputes of interest to the public, holding that the Firestone's marital difficulties were private in nature. A public controversy has generally been defined as a "real dispute, the outcome of which affects the general public or some segment of it", other than the immediate participants of the dispute. *Waldbaum v. Fairchild Publications, Inc.*, 627 F. 2d 1287, 1296 (D. C. Cir.) *cert. denied*, 449 U. S. 898, 101 S. Ct. 266, 66 L. Ed. 2d 128 (1980). Generally, it will be a topic upon which sizeable segments of society have different, strongly held views. *Lerman v. Flynt Distributing Co., Inc.*, 745 F. 2d 123 (2nd Cir. 1984), *cert. denied*, — U. S. —, 105 S. Ct. 2114 (1985).

With this background, there can be no question that there was a public controversy here. Hauling, storing, and selling of sewer sludge raises issues on which there will be differing opinions, even where, as here, the process is for a valuable purpose such as reclaiming land. The controversy was not created by WLKY as the Louisville papers had been following the efforts of plaintiffs for some time prior to defendants' first news telecast. Appellees argue that because only a small number of persons reside near the attempted Indiana site, there was no "controversy" beyond the borders of an almost unpopulated neighborhood. However, we do not find the population of a given area to be dispositive of whether or not a particular subject is a matter of public controversy.

Second, we must look to the nature and extent of Thompson's involvement in the controversy. In general, the plaintiff must voluntarily thrust himself into the vortex of the dispute by actively participating in the public issue in a manner intended to obtain attention. *Marcone, supra*, at 1083. Courts have generally looked to the voluntariness of the individual's participation, the extent of his access to the media for effective communication and the prominence of his individual role. *Clark v. Amer. Broadcasting Corp.*, 684 F. 2d 1208, 1218 (6th Cir. 1982), *cert. denied*, 460 U. S. 1040 (1983).

Other cases we have examined provide a framework for determining this question. For example, a meat producer that aggressively advertised its product in the media was treated as a limited purpose public figure for comment on the quality of the product. *Steaks Unlimited, Inc. v. Deaner*, 623 F. 2d 264 (3rd Cir. 1980). An agent who held news conferences to attract media attention for himself and his client was a public figure in that context. *Woy v. Turner*, N.D. Ga., 573 F. Supp. 35 (1983). Finally, a

manufacturer of Laetrile, a controversial drug used to treat cancer was held to be a limited purpose public figure when it issued a press kit to media representatives to counter adverse publicity it had received. *Foodscience Corp. v. McGraw-Hill, Inc.*, S.D. N.Y., 592 F. Supp. 367 (1984).

From our review of the many cases dealing with this question, we conclude that Thompson and the joint venture were also limited purpose public figures. The record before us indicates tht plaintiffs voluntarily sought publicity and media coverage of their product and process and had apparent access to the media during the course of the controversy. Thompson himself was the project's main promoter, speaking at public meetings, issuing press kits to the media, and even "sampling" some of his product on television and at public meeting to prove that it was safe.

We believe the court below erroneously concluded that because plaintiffs were not public "officials", the negligence standard should be applied. However, the law is clear, as illustrated by the cases cited herein, that limited public "figures" are also subject to the actual malice standard. We also note that corporations have been treated as public figures under the same tests set forth in this opinion. *Foodscience, supra*, at 364; *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U. S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984). We conclude that the joint venture thrust itself into the public controversy that attends the moving and storing of this particular product and thus it also became a corporatae public figure.²

We hold that the instructions to the jury on simple negligence were improper. This error was not cured by the

²The jury rejected Thompson-Kissel Company's claim for libel under the simple negligence standard, and there is no appeal from that portion of the judgment. Thus, we need not decide whether Thompson-Kissel was a corporate public figure.

"false light" instructions which did include actual malice elements nor was it waived by appellant's request for a "single recovery" on both claims. This request was proper under *McCall v Courier-Journal*, Ky., 623 S. W. 2d 882 (1981), and counsel sufficiently objected to the instructions given so as to preserve this issue before our Court.

III. ACTUAL MALICE

Because plaintiffs were limited purpose public figures, they were required to prove that defendant's remarks were made with actual malice. Actual malice has been defined as publishing material with knowledge that it was false or with reckless disregard of whether it was false or not. *N. Y. Times v. Sullivan*, *supra*, 376 U. S. at 280. "Reckless disregard" has further been defined to mean publishing "with a high degree of awareness of probable falsity, or entertaining serious doubts as to its truth." *St. Amant v. Thompson*, 390 U. S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968).

Appellants argue that neither the false light claim nor the libel action can stand as there was insufficient evidence to support a verdict under the actual malice standard. Our review on appeal in a First Amendment case has recently been held to be subject to a stricter standard than the "clearly erroneous" rule of CR 52.01. In *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485, 514, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984), the Supreme Court held that appellate judges in First Amendment cases:

. . . must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.

With this standard in mind, we must turn to the facts of the case to determine whether there is clear and con-

vincing evidence of actual malice. The Court below permitted two broadcasts to go to the jury on the libel counts. The December 18, 1980, broadcast was the basis of the libel claim of the joint venture and the January 8, 1981, broadcast which stated that Thompson was "facing criminal and civil counts."

As to the December 18, 1980, broadcast, we agree that the evidence can not meet the required standard of review. There had in fact been civil and criminal actions filed against the property owner at the Charleston site. Consequently, it cannot be said that the broadcast was made with the knowledge that the information was false or with reckless disregard of its truth or falsity. Although it may be argued that the broadcast could be interpreted to infer that the charges were against "the firm" (joint venture) since we have herein held that a business entity has no right of action for being placed in a "false light," the evidence fails to show actual malice with convincing clarity and the libel claim of the joint venture should be dismissed.

Regarding the broadcast of January 18, 1981, Mr. Koebrich, the reporter, testified that this statement was based on information from the county prosecutor and from the county planning commission attorney that they were investigating the possibility of filing charges. Koebrich testified that he believed "facing" meant something less than that charges were actually being filed.

The prosecutor testified that he told Koebrich that any charges were absolutely contingent upon proof that the by-product was a legal contaminant. Furthermore, he stated that he had never said any of the plaintiffs were "facing civil or criminal charges." However, his recollection was that he had said the state was "go" on bringing charges, contingent on the results of the lab tests on the product. The attorney for the planning commission testified that they were looking at the "possibility" of a violation of

criminal statutes or regulations by "Mr. Thompson and his companies."

Although we believe it is a close question under the clear and convincing standard, based on the discrepancies between what Koebrich was told and what he reported and based on the fact that "facing charges" could be subject to different interpretations, we conclude that there was sufficient evidence to go to the jury on question of actual malice.

It is unnecessary for us to address the remaining issues on appeal and the cross-appeal. Those complaints relate to the certainty of proof required for recovery of damages for loss of business. The cross-appeal complains that the court below erred in setting aside the two million dollar award to joint venture. Appellants complain that none of the awards for injury to business were sufficiently proven. However, in light of our holdings that corporations cannot recover for "false light," that the plaintiffs were required to prove actual malice to recover for libel and under that standard the joint venture's libel claim must be dismissed and Thompson's judgment reversed and remanded for retrial, the remaining issues are rendered moot. The clarify, we direct as follows:

1. *Thompson-Kissel*—the judgment awarding damages for false light invasion of privacy is reversed. As there is no appeal from the jury's refusal to find libel against it, its claims are dismissed.
2. *The Joint Venture*—the judgment allowing recovery for false light invasion of privacy is reversed. The action for libel is dismissed.
3. *H. W. Thompson*—the judgment is reversed and remanded for retrial on Thompson's false light and libel

claims pursuant to the "actual malice" standard set forth herein.

ALL CONCUR.

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Thompson-Kissel Co.

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SUPREME COURT OF KENTUCKY

87-SC-660-D

(86-CA-1243 & 86-CA-1298-MR)

J & C, INC. and T-K COMPANY,
A Joint Venture; H. W. THOMPSON,
Individually, and
THOMPSON-KISSEL COMPANY - - - - *Movants*

v.

COMBINED COMMUNICATIONS CORPORATION
OF KENTUCKY, INC., and
MARK KOEBRICH - - - - - *Respondents*

Jefferson Circuit Court
No. 81-CI-03556

AND

COMBINED COMMUNICATIONS CORPORATION
OF KENTUCKY, INC., and
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v.

H. W. THOMPSON - - - - - *Respondent*

Jefferson Circuit Court
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AND

88-SC-08-D
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ORDER DENYING DISCRETIONARY REVIEW

The motions of the movants for a review of the decision of the Court of Appeals are denied.

It is further ordered that the original motion for discretionary review filed September 2, 1987, is dismissed as moot.

The opinion of the Court of Appeals is ordered not to be published.

ENTERED March 22, 1988.

(s) Robert F. Stephens
Chief Justice